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81-1619

No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

GEORGIA-PACIFIC CORPORATION,
*Petitioner,*

v.

LYMAN LAMB COMPANY, et al.,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

FREDERICK P. FURTH
*(Counsel of Record)*
THOMAS R. FAHRNER
DANIEL S. MASON
MICHAEL P. LEHMANN
CRAIG C. CORBITT
FURTH, FAHRNER, BLUEMLE & MASON
201 Sansome Street, Suite 1000
San Francisco, California 94104
Telephone: (415) 433-2070

*Attorneys for Petitioner Georgia-Pacific Corporation*

*Of Counsel:*
JAMES M. NICHOLSON
THOMAS E. WITHYCOMBE
WILLIAM E. CRAIG
GEORGIA-PACIFIC CORPORATION
900 S.W. Fifth Avenue
Portland, Oregon 97204
Telephone: (503) 222-5561

**Dated: March 2, 1982**

## QUESTIONS PRESENTED

**Conspiracy:**

1. Can a conspiracy to fix one element of a price be inferred from conscious parallel conduct plus direct communications, where it is not shown that such communications involved discussion or agreement concerning that element?

2. Can absent parties be held to be antitrust co-conspirators with parties before the court, where the only evidence relied upon by the trial court in connecting those absent parties to the conspiracy found by the jury is conscious parallel conduct?

**Damages:**

3. In a "single-element" price-fixing case, can the measure of damages be based solely upon consideration of the only element which allegedly has been fixed?

4. Must the trial court instruct the jury that the measure of damages in a price-fixing case is based upon the difference between the total price paid and what the total price would have been absent a conspiracy?

## PARTIES TO THE PROCEEDINGS

In addition to petitioner, appellants below were Weyerhaeuser Company and Willamette Industries, Inc.

In addition to Lyman Lamb Company, appellees below were Plywood Distributing Company, Baton Rouge Lumber Company, and the City of Arkadelphia, Arkansas. The remaining plaintiffs in the cases consolidated for trial in *In re Plywood Antitrust Litigation,* Multidistrict Litigation No. 159, and the remaining members of the plaintiff class, consisting of all persons who purchased softwood plywood directly from the

manufacturers during the period from February 23, 1968 through December 31, 1973, also had an interest in the outcome of the appeal.*

* The following entities are subsidiaries and affiliates of Georgia-Pacific Corporation: Ashley, Drew & Northern Railway Company; California Western Railroad; Fordyce and Princeton R.R. Co.; Four Hundred Health Club, Inc.; Georgia-Pacific Export, Inc.; Georgia-Pacific Finance Company; Georgia-Pacific Leasing Corporation; Aztec Trading Company, S.A.; Compania de Navegacion Arboreous, S.A.; Exchange Oil & Gas Corporation; Bayou Hydrocarbons, Inc.; Georgia-Pacific International Corporation; Anaconias Compensados e Laminados, Limitada; Beaver Wood Fibre Company, Limited (The); Federal Packaging and Partition Company Limited; G-P Inveresk Corporation; Georgia-Pacific Building Materials Sales, Ltd.; Georgia-Pacific GmbH; Georgia-Pacific S.A.; Georgia Steamship Company, Inc.; Inveresk Group Limited; Lianga Bay Logging Company, Inc.; Magallanes Trading Company, S.A.; Metro Steamship Company; P.T. Georgia-Pacific Indonesia; P.T. Kalimanis-Plywood Industries; Georgia-Pacific Investment Company; National Management, Inc.; St. Croix Pulpwood Company; St. Croix Pulpwood, Limited; Holly Hill Lumber Company; Hudson Pulp & Paper Corp.; Hudson American Corp.; O.P.M. Co., Inc.; Montana Pacific International; Rex Timber Inc.; Saint Croix Water Power Company—New Brunswick (The); The Sprague's Falls Manufacturing Company (Limited); St. Croix Water Power Company—Maine; and Thacker Land Company.

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v.

LYMAN LAMB COMPANY, et al.,
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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Georgia-Pacific Corporation respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit entered on September 8, 1981.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit, *In re Plywood Antitrust Litigation,* 655 F.2d 627 (5th Cir.), *reh. denied,* 663 F.2d 101 (5th Cir. 1981) appears, along with the judgment denying rehearing *en banc,* as Appendices A and G, respectively. The unreported judgment and order of the District Court for the Eastern District of Louisiana appear as Appendix B. The order denying the motion for *j.n.o.v.* and a new trial, unofficially reported at 1979-1 CCH Trade Cas. ¶ 62,459 (E.D.La. 1978), appears as Appendix C. Because of

its direct application to the issues raised in this petition, the opinion of the Court of Appeals for the Ninth Circuit in *Boise Cascade Corp.* v. *FTC,* 637 F.2d 573 (9th Cir. 1980) is also included as Appendix J.

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on September 8, 1981, and timely petitions for rehearing and rehearing *en banc* were denied on November 3, 1981. On January 18, 1982, this Court extended the time for filing this petition to March 3, 1982.[1]

## STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides, in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides, in pertinent part:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee . . ."

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[1] Petitioner joins in the separate petition for certiorari filed by Weyerhaeuser Company and Willamette Industries, Inc., who also were defendants at the trial below and appellants in the Court of Appeals, and adopts the reasons for granting the writ set forth in that petition.

## STATEMENT OF THE CASE

### I.

### PRELIMINARY STATEMENT.

This case involves an aspect of the pricing practices of the plywood industry which was simultaneously the subject of a Federal Trade Commission proceeding and this civil antitrust suit under Section 1 of the Sherman Act. The challenged practice is the industry's use of a pricing system in which the delivered price of plywood was the sum of (1) an individually negotiated mill price; and (2) freight charges, either based upon the rail freight rate from the West Coast, or computed at "standard" rather than actual weights. Thus, the total delivered price was determined by inclusion of a freight charge which generally exceeded the actual cost of shipment; the mill price component (and thus the total delivered price) was determined on a competitive basis.

The Fifth Circuit left standing a jury verdict against Georgia-Pacific Corp., Weyerhaeuser Company, and Willamette Industries, Inc. (plus dozens of other alleged co-conspirators who settled prior to trial), for fixing the price of the freight element of the total purchase price of plywood. The Fifth Circuit held that a conspiracy was properly inferred, despite the lack of any evidence beyond conscious parallel conduct plus contacts providing an opportunity to conspire; it thus applied a legal standard directly in conflict with recent decisions of the Third and Seventh Circuits. Moreover, the verdict joining absent parties to this conspiracy was allowed to stand on the basis of "slight evidence" consisting only of conscious parallel conduct; this ruling is totally unprecedented.

The Fifth Circuit also approved a "single-element" formula, based upon the freight factor alone, for the measure of damages to plywood purchasers—a formula submitted to the jury *sua sponte* by the trial court, through "all or nothing" special interrogatories, without instructions that any other element of the price could be considered. As a result, the entire amount by which this one element (the freight cost of plywood) allegedly was artificially raised was held to be the exact

amount by which the total purchase price of plywood was raised. This damage measure conflicts not only with the decisions of other circuits which have considered the issue, but with the decision of the Ninth Circuit, in reviewing a parallel action against the same defendants initiated by the Federal Trade Commission, that the challenged practices had *no* adverse effect on the total purchase price. *Boise Cascade Corp.* v. *FTC*, 637 F.2d 573 (9th Cir. 1980), App. J.

The incongruent result of the Ninth and Fifth Circuit decisions is that in the former proceeding, the court found no evidence that purchasers of plywood had paid higher prices as a result of the practices at issue, while in the latter proceeding, petitioner and its co-defendants were found liable under a damage measure which could result in enormous payments to those same purchasers. Estimates of damages reported in the press are truly staggering—ranging as high as *two billion dollars.*[2] According to respondents' counsel, "[i]f the formula (for assessing damages) reached by the jury is applied, this will probably represent the largest antitrust verdict in history."

Review by this Court is particularly important because this petition presents antitrust issues which the Court has never directly addressed, including the standard of proof beyond conscious parallel conduct necessary to permit an inference of conspiracy (*see Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537 (1954)), and the appropriate standard for measuring damages in antitrust cases involving products with multiple pricing elements. Although the Court considered the issue of liability for fixing a single element of a total purchase price in *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1980), the issue of measuring damages in such cases was not resolved.

These issues assume further significance because they arise in the context of a large, multidistrict class action. The tension between the policy of Rule 23 of the Federal Rules of Civil

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[2] *Wall Street Journal*, Sept. 9, 1981, at p.56, c.2. Petitioner does not concede that the total damages will be anywhere near this amount, even should the result below stand. There is no doubt, however, that the total liability will be substantial if the verdict below is upheld.

Procedure, which encourages the aggregation of individual claims, and the rights of individual defendants to insist upon reasonable proof before entry of the enormous judgments made possible by this procedural device—judgments which are trebled under the antitrust laws—is sharply presented by the facts of this case.

## II.

## HISTORY OF THE PROCEEDING.

### A. The Plywood Industry.

In the years prior to 1964, when virtually all plywood was manufactured in the Pacific Northwest, the practice developed of quoting a purchase or "delivered" price consisting of two parts: (1) an individually negotiated "mill" price (also known as the "base" or "index" price), plus (2) a freight charge based upon the rail freight rate from the West Coast to the geographic zone of delivery ("West Coast freight"). Since the ICC tariffs resulted in identical freight costs for all sellers to ship to a given geographic area, it was the variation in mill prices which resulted in variations in delivered prices. Because most plywood was sold before its weight was known, the practice also developed of quoting freight according to "standard" rather than actual weights, so that the purchaser could be provided with a firm delivered price at the time of quotation.

In 1964, following technological advances which made possible the use of Southern pine to make plywood, petitioner Georgia-Pacific opened the first plywood mill in the South. Other plywood producers soon followed. In the early years of the Southern plywood industry, the Western mills remained the dominant suppliers, even in the South, and Western plywood commonly was perceived as the superior product. Southern producers attracted customers for their newer product by quoting prices that were generally lower than those for Western plywood. To provide ease of comparison for buyers, Southern producers adopted the same manner of price quotation as their Western competitors: individually negotiated mill prices plus West Coast freight calculated according to standard weights. As explained by the Ninth Circuit, and confirmed by the record below:

> "The use of West Coast freight enabled buyers to compare western and southern plywood prices by reference to a single mill or index price, knowing that the precise difference would be reflected in a total delivered price. Without West Coast freight, comparison would also have been more cumbersome because southern freight rates are point-to-point rather than zone rates and vary according to the weight of the load." (637 F.2d at 574 n.1, App. at J-2 to J-3.)

Not only were Southern prices generally lower than Western prices, but the delivered prices among both Southern and Western producers differed from seller to seller and from transaction to transaction, fluctuating according to supply and demand, and in response to changing market conditions. *Id.* at 577, App. at J-9.

**B. The FTC Proceeding And The Ninth Circuit Decision.**

The Federal Trade Commission initiated an action in April 1974, against the three trial defendants below, Georgia-Pacific, Weyerhaeuser and Willamette, plus two additional plywood producers, Boise Cascade Corp. and Champion International Corp. That complaint charged these producers with violating section 5 of the FTC Act (15 U.S.C. §45) by their use, individually and in combination, of the West Coast freight and standard weight systems described above. Following an initial decision of the Administrative Law Judge in 1976, the Commission issued an Opinion and Order in January 1978, which directed the producers to cease and desist from quoting West Coast freight, on the ground that "the concurrent although noncollusive adoption by competitors of an artificial method of pricing which restrains competition" was unlawful under section 5. *Boise Cascade Corp.*, 91 F.T.C. 1, 103 (1978). However, the Commission found that the practices in question had arisen innocently. The Commission concluded that the producers were "obviously not" engaged in "a price fixing cartel" (*id.* at 99 n.10, 102, 105), and declined to adopt the ALJ's alternative finding that a Sherman Act conspiracy could be inferred. The Commission added: "[W]e hasten to note

that the practice of including West Coast freight in delivered price quotations is only one of many factors affecting the price of southern plywood." *Id.* at 98.

In May 1980, the Ninth Circuit denied enforcement of the Commission's Order, holding that there was no evidence that the challenged practices had undermined price competition or had artifically raised the purchase price of plywood. *Boise Cascade Corp.* v. *FTC*, 637 F.2d 573 (9th Cir. 1980), App. J. The Court of Appeals found that petitioner's delivered pricing practice was "a natural and competitive development in the emergence of the southern plywood industry" (*id.* at 582, App. at J-18), observing that the purchase price of plywood appeared to have been unaffected by the practice:

> "Over the long run, the price for plywood sheathing rises or falls in response to market factors affecting supply and demand: housing starts, weather conditions, box car shortages and strikes. *We have found no evidence in the record suggesting that the price of plywood has been unresponsive to market conditions.*
>
> * * * * *
>
> "We need not discuss all the evidentiary disputes between the parties to determine that *there is not substantial evidence in the record, considered as a whole, to sustain the Commission's finding that petitioners' delivered pricing methods stabilized prices in the plywood industry at supranormal levels.* In truth, the Commission has provided us with little more than a theory of the likely effect of the challenged pricing practices.
>
> * * * * *
>
> "In light of the precedents and the statements of leading authorities on delivered pricing, including the Commission itself, *the existence of substantial bargaining in the base price of plywood provides at least a prima facie inference*

> *that competition has not been affected by the use of West Coast freight."* (*Id.* at 577, 578, 579-580, App. at J-9, J-11 to J-12, J-13 to J-14; emphasis added.)[3]

In addition, the Ninth Circuit found no basis to suspect that the purchase price would have differed, had "actual" rather than "West Coast" freight been quoted:

> "The Commission has cited no evidence that tends to disprove *the common-sense proposition that southern producers would simply adjust the index* [mill] *price upwards if they were quoting delivered prices in terms of actual freight.*" (*Id.* at 580, App. at J-14; emphasis added.)

This "common sense" proposition directly contradicts the assumption implicit in the measure of damages approved by the Fifth Circuit—that the mill price would have been *exactly the same* had actual freight been quoted. Moreover, the Ninth Circuit's conclusion that the record did not evidence an anti-competitive increase in purchase prices is directly contradicted by the Fifth Circuit's approval of a measure of damage formula that those prices were raised by exactly the amount by which West Coast freight exceeded actual freight.

### C. The Present Case: Trial And Affirmance By The Fifth Circuit.

The trial of the private actions, filed under section 4 of the Clayton Act (15 U.S.C. §15), commenced in October 1978, after the FTC decision but before the Ninth Circuit announced its decision refusing to enforce the FTC's order.

Four points about the record are necessary to an understanding of the questions presented by this petition.

*First,* the evidence of a conspiracy or agreement to utilize the delivered price system was entirely circumstantial. No witness testified to any such agreement and no document

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[3] The Ninth Circuit also found "a complete absence of evidence implying overt conspiracy" (*id.* at 582, App. at J-18), and declined "to follow the Commission's suggestion that industry-wide adoption of an artificial method of price-quoting should be deemed a *per se* violation of section 5 by analogy to section 1 price-tampering cases." *Id.* at 581, App. at J-16.

reflected one. Although there were minor differences from the FTC record, the substance of the evidence in the trial below was identical. Respondents introduced voluminous findings of fact from the FTC proceeding, and repeatedly stressed the parallel to the Commission's action. Vol. 45, Tr. 152-83; Vol. 56, Tr. 3244. Respondents' only live witness was an economist who conceded that the West Coast freight system had no impact whatsoever on delivered prices at the outset of the Southern plywood industry, but contended that the freight "overcharge" should have "evaporated" over some unspecified period of years to reflect the differences between West Coast and actual freight; he insisted that the supply and demand characteristics of the plywood industry were irrelevant to his analysis. Vol. 53, Tr. 2464-72. No plywood purchaser testified that the West Coast freight system had adversely affected delivered prices.

*Second,* the jury in effect was instructed that it could find an unlawful conspiracy to maintain the freight pricing practices from no more than (1) the parallel use of these practices by the producers; and (2) proof of lawful contacts between some of them.

*Third,* at the close of evidence, the trial court submitted special interrogatories to the jury on the appropriate measure of damages, despite the fact that no direct evidence had been presented and no jury instructions had been submitted on this issue by either side. In fact, the trial court had previously bifurcated damage issues from liability issues, and subsequently acknowledged that petitioners had understood that the measure of damages would not be tried in the liability phase.[4] The special interrogatories, however, combined the issue of measure of damages with the preliminary fact of damage question:

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[4] *See* Vol. 59, Tr. 656. The measure of damages ultimately adopted was specifically *disclaimed* by respondents during the class certification proceedings in 1976, a position which the district court relied upon in part in ordering class certification: "There is no contention that defendants added a uniform freight charge to a uniform base price to arrive at their delivered prices." *In Re Plywood Antitrust Litigation,* 76 F.R.D. 570, 581 (E.D. La. 1976), App. at D-17. Consistent with this position, respondents submitted the following proposed jury instruction:

*footnote continued on following page*

"2. (a) Did the use of 'West Coast freight' in the pricing of Southern Pine plywood during the period from February 23, 1968, to December 31, 1973, cause financial damage to the purchasers of such plywood?

"(b) if 2(a) is answered 'yes', was that damage equal to the amount by which 'West Coast freight' exceeded the actual freight charge (or the pick-up allowance)?

* * * * *

"4. (a) Did the use of 'standard weights' in the pricing of Western fir plywood during the period from February 23, 1968, to December 31, 1973, cause financial damage to the purchasers of such plywood?

"(b) If 4(a) is answered 'yes', was that damage equal to the amount by which freight calculated on the basis of 'standard weight' exceeded the actual freight charge?" (App. at I-2 to I-3.)

These interrogatories did not provide the jury with a means by which it could indicate that damages were incurred in some amount *less* than the *entire* amount of the freight "overcharge." For example, if the jury had found that, without the delivered price system, an amount equal to 70% of the

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*footnote continued from previous page*

"In this part of the case, all that you are called upon to decide is whether the defendants did combine to fix prices, or any part of the price they charged; and, second, whether what they did had any influence or effect on that aspect of the price. *You will not now be asked to determine the specific amount of damage suffered by any plaintiff or plaintiffs as a whole, but only whether the acts of defendants did some damage to one or more of the plaintiff class in some amount, however large or small.* If you find that they did combine and there was any such effect on what the plaintiffs or any of them paid, then you must find in favor of plaintiffs and against defendants, leaving for further proceedings the specific amount to be determined." (Pls. Proposed Inst. No. 45, emphasis added.)

Until the windfall opportunity presented by the trial court's interrogatories, respondents gave no indication that they had changed their position.

freight "overcharge" would have been added to the mill price and 30% would have been passed through to the purchasers in the form of lower net prices, there was no means provided for the jury to communicate that conclusion. Instead, the jury would have been compelled to give a "no" answer to the damages interrogatories. In this way, the form of the submission implied to the jury that unless it answered "yes," defendants would have no damage liability whatever, even if the jury concluded that some (but not all) of the "overcharge" did add to the ultimate delivered price to plywood purchasers.

*Fourth,* the trial court altogether failed to instruct the jury in any respect as to the law governing the measure of damages, or the legal principles applicable to the damage interrogatories; it merely observed that plaintiffs sought "yes" answers, and defendants sought "no" answers to the above questions. Specifically, it did not tell the jurors that they should consider whether, had the plywood producers not utilized the delivered price system, the mill price of plywood would have increased to some extent; and that if it would have increased, then the damages due to the freight "overcharge" would be diminished to that extent. *See* Addendum, pp. d-f.

In November 1978, the jury returned a verdict that Georgia-Pacific, Weyerhaeuser and Willamette had engaged in (1) a conspiracy with all other Southern pine plywood manufacturers to use "West Coast freight" in plywood pricing, and (2) a conspiracy with all other softwood plywood manufacturers to use the "standard weight" system in the pricing of Western fir plywood. Not surprisingly, the jury adopted the only measure of damages (apart from zero) suggested by the trial court's interrogatories: the differences between West Coast freight and actual freight, and between standard weights and actual weights.[5]

On September 8, 1981, the Fifth Circuit affirmed in all respects the trial court's judgment entered from the jury verdict.

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[5] Thereafter, the trial court granted summary judgment to respondents, four sample plaintiffs, and fixed the amounts of their individual damages, which total more than $1.1 million. The calculation of individual damages for other class members is the subject of current proceedings in the trial court.

## REASONS FOR GRANTING THE WRIT

The decision of the Fifth Circuit finds antitrust liability under Section 1 of the Sherman Act for practices which the Ninth Circuit held could not be restrained under the less exacting standard of Section 5 of the Federal Trade Commission Act. And while the Ninth Circuit found unrefuted the "common-sense proposition" that without use of the industry's freight pricing system, plywood producers would have increased their mill prices, in the present case the courts below found that plywood purchasers have been damaged by the entire amount of the freight "overcharge." As a result, the petitioners stand exposed to massive treble damages—by respondents' own estimate as much as two billion dollars.

As will be shown, these anomalous determinations are not the result of inconsistent factfinding upon different records. Rather, the judgment in the present case is the product of fundamental errors of law by the trial court and the Fifth Circuit which in turn led to a judgment differing dramatically from that of the Ninth Circuit. Both in finding a violation of Section 1 and in determining the measure of damages, the courts below proceeded in a manner contrary to the prevailing rules of law. Review of the important legal questions presented does not require scrutiny of the factual record, for the issues arise from the basis upon which the case was submitted to the jury, and the Fifth Circuit's affirmance.

### I.

### THE FIFTH CIRCUIT APPLIED ERRONEOUS LEGAL STANDARDS IN UPHOLDING THE CONSPIRACY VERDICT.

#### A. The Holding Conflicts With The Rule In Other Circuits That Conscious Parallelism Plus Opportunity Contacts Will Not Support A Finding Of Conspiracy.

This case was submitted to the jury on instructions which permitted it to find an unlawful conspiracy based upon no more than: (1) the defendants all utilized the challenged West Coast freight system; and (2) some of the defendants communicated

with one another with respect to various matters, occasionally including West Coast freight, but never agreed as to any of those matters. The Fifth Circuit affirmed, on the basis that evidence of that and no more is legally sufficient to establish a conspiracy or agreement to restrain trade. The lower courts' understanding of the law squarely conflicts with decisions of the Seventh and Third Circuits. *See Weit* v. *Continental Ill. Nat'l Bank & Trust Co.*, 641 F.2d 457 (7th Cir. 1981), *petition for cert. pending* (No. 81-152); *Venzie Corp.* v. *United States Mineral Prods. Co.*, 521 F.2d 1309 (3d Cir. 1975). The standard employed authorizes a finding of conspiracy unjustified by rational inferences from the evidence, thereby permitting the imposition of massive treble damages upon sheer speculation by the jury.

1. *Submission To The Jury.* The Fifth Circuit's incorrect ruling stemmed directly from the trial court's error of omission in instructing the jury. The trial court failed to instruct the jury that mere parallel conduct does not warrant the inference of conspiracy, when it is coupled only with communications which do not concern the subject matter of the conspiracy, or which do not indicate agreement about that subject matter. No *limiting* instructions to this effect were given to the jury. The jury was told of other factors it *could* consider, *e.g.*, the existence of intercompetitor sales agreements which used West Coast freight or standard weights, whether the parallel pricing practice "made sense in light of the economic industry conditions," *etc.*[6] *See* Addendum, pp. b-d. However, these factors were not identified as limitations or conditions upon a finding of liability, but only as permissible subjects of jury consideration. Thus, *the jury remained free to return a verdict of liability even if none of these other factors were found applicable, and it found nothing more than parallel pricing behavior and an opportunity for competitors to communicate.*

2. *The Fifth Circuit Opinion.* The Court of Appeals upheld the jury's verdict on the basis of a record consisting of two primary items of evidence: *First,* conscious parallel behav-

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[6] Appropriate objections to the court's instructions were made at trial. Vol. 56, pp. 3574-77. Petitioners submitted proposed instructions which would have cured the defects. Defs. Supp. Inst. 8, 8(a), 8(b).

ior among plywood manufacturers in the use of West Coast freight and standard weights. *Second,* petitioner, its co-defendants at trial, and a few other producers occasionally communicated with each other, and some of those communications involved some aspect of pricing. The evidence did not show that the so-called conspirators *ever discussed* standard weights, or that they conspired with respect to West Coast freight.[7] On this record, the Fifth Circuit applied the following legal standard:

> "The parallel pricing conduct clearly demonstrated in the record plus the numerous items of direct evidence of communication between high-level personnel on pricing policy adequately support the jury's verdict." (655 F.2d at 634, App. at A-9.)

This standard is contrary to the prevailing rule of law.

3. *The Law Of Other Circuits.* The result below cannot be reconciled with the decisions of the Seventh and Third Circuits in the *Weit* and *Venzie* cases cited above. In *Weit,* it was alleged that various banks conspired to fix the interest rate paid by a class consisting of certain consumer credit card holders. The evidence consisted, *inter alia,* of parallel interest rates, business contacts between officials of the banks, and meetings

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[7] The discussions among the plywood producers arguably evidence price information exchanges. Standing alone, however, such exchanges are not *per se* violations, but must be judged under the Rule of Reason. *United States* v. *United States Gypsum Co.,* 438 U.S. 422, 441 n.16 (1978). Indeed, routine monitoring of rival business practices (which the evidence here reflects) is fully consistent with competition. *See Pevely Dairy Co.* v. *United States,* 178 F.2d 363, 368-69 (8th Cir. 1949), *cert. denied,* 339 U.S. 942 (1950); *United States* v. *Borden Co.,* 111 F.Supp. 562, 576 (N.D.Ill. 1953), *aff'd in part and remanded in part per curiam,* 347 U.S. 514 (1954).

This case is thus quite unlike *Gainesville Utils. Dept.* v. *Florida Power & Light Co.,* 573 F.2d 292 (5th Cir.), *cert. denied,* 439 U.S. 966 (1978), upon which the Fifth Circuit relied. 655 F.2d at 634, App. at A-9. In *Gainesville,* the evidence consisted of parallel refusals to deal plus communications between the alleged conspirators which "border[ed] on a blatant agreement to divide the market." 573 F.2d at 301.

among bank officials to plan a compatible credit card system; during some of these meetings the subject of the alleged conspiracy (interest rates) was discussed. 641 F.2d at 460, 462. The Seventh Circuit affirmed the trial court's entry of summary judgment against plaintiffs, on the ground that this evidence showed nothing more than "opportunity to conspire," and thus was not probative of a conspiracy. *Id.* at 462-65.

*Weit* stands for the proposition that evidence of parallel activity plus the opportunity to conspire, where the parallel activity is in the independent business interest of each alleged co-conspirator, will not permit the inference of a conspiracy. Moreover, direct communications among alleged co-conspirators engaging in identical pricing conduct will not support a finding of conspiracy where there is no evidence that the communications reflected any agreement concerning the subject matter of the purported conspiracy.

In an analogous holding, the Third Circuit in *Venzie* affirmed the entry of a *j.n.o.v.* on a refusal to deal claim. The alleged evidence of conspiracy consisted, as in *Weit*, of parallel conduct, opportunity contacts among alleged co-conspirators and proof of actual meetings among the defendants at which they purportedly discussed the subject of the alleged conspiracy, plaintiffs' trade inquiries. 521 F.2d at 1312-13. The defendants rebutted this evidence with denials that any conspiratorial agreement had been reached. The Court of Appeals agreed that the evidence of conspiracy was insufficient to go to the jury, explaining:

> "While the jury was free to disregard the defendants' testimony that no agreement of any kind was formulated during the course of these contacts, mere disbelief could not rise to the level of positive proof of agreement to sustain plaintiffs' burden of proving conspiracy. Furthermore, while proof of contacts between the manufacturer and its licensee during the crucial summer period may demonstrate an opportunity for formation of a conspiracy,

such *an opportunity is significant only if other evidence permits an inference that an agreement did in fact exist.*" (*Id.* at 1313, emphasis added).[8]

4. *Need For Review By This Court.* Under the standard adopted by the Third Circuit in *Venzie* and the Seventh Circuit in *Weit*, the evidence in this case would be insufficient as a matter of law to support an inference of conspiracy. "Communication between high-level personnel on pricing policy" (655 F.2d at 634; App. at A-9) is no stronger evidence than the communications between high-level personnel on credit terms and purchase inquiries found inadequate in *Weit* and *Venzie*, respectively. Indeed, the evidence in *Weit* and *Venzie* was *stronger* than in *Plywood*, since the alleged subject matters of the conspiracy clearly were discussed. The standard applied by the Fifth Circuit and endorsed implicitly by the trial court in its jury instructions is nothing more than the "conscious parallelism plus opportunity contacts" rule rejected by the Third and Seventh Circuits. Particularly in light of the Ninth Circuit's observation that the parallel conduct at issue here was consistent with each plywood manufacturer's individual self-interest (637 F.2d at 578, App. at J-11), the evidence of additional opportunity contacts should not have permitted the inference of conspiracy.

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[8] Numerous other cases support the above analysis. *See, e.g., Tose* v. *First Pennsylvania Bank, N.A.*, 648 F.2d 879, 894-95 (3d Cir.), *cert. denied*, 102 S.Ct. 390 (1981); *Oreck Corp.* v. *Whirlpool Corp.*, 639 F.2d 75, 79 (2d Cir. 1980), *cert. denied*, 102 S.Ct. 639 (1981); *Hanson* v. *Shell Oil Co.*, 541 F.2d 1352, 1359 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977); *In re Folding Carton Antitrust Litigation (Dean Foods Co.* v. *Alton Box Bd. Co.)*, 1980-2 CCH Trade Cas. ¶ 63,460 at 76,431 (N.D.Ill. 1980); *Schoenkopf* v. *Brown & Williamson Tobacco Corp.*, 483 F.Supp. 1185, 1189-92 (E.D. Pa.), *aff'd*, 637 F.2d 205 (3d Cir. 1980); *Hunt* v. *Mobil Oil Corp.*, 465 F.Supp. 195, 231 (S.D.N.Y. 1978), *aff'd*, 610 F.2d 806 (2d Cir. 1979); *United States* v. *General Motors Corp.*, 1974-2 CCH Trade Cas. ¶ 75,253 at 97,667 (E.D.Mich. 1974); *Overseas Motors, Inc.* v. *Import Motors, Ltd.*, 375 F.Supp. 499, 535 (E.D.Mich. 1974), *aff'd*, 519 F.2d 119 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975); *United States* v. *FMC Corp.*, 306 F.Supp. 1106, 1124-25, 1129 (E.D. Pa. 1969); *United Shoppers Exclusive* v. *Broadway-Hale Stores, Inc.*, 1966 CCH Trade Cas. ¶ 71,727 at 82,271 (N.D. Cal. 1965).

The conflicting legal standards concerning the evidence beyond parallel conduct necessary to show antitrust conspiracy should be resolved by this Court. In the 28 years since *Theatre Enterprises, Inc.*, v. *Paramount Film Distributing Corp.*, 346 U.S. 537 (1954), when this Court held that conscious parallelism alone cannot prove a conspiracy, the Court has not directly addressed the question of what "plus factors," or proof beyond conscious parallelism, suffice to show one. Unless antitrust liability is to be left to subjective, impressionistic or capricious factfinding by juries—exonerating some while holding others liable—guidance from this Court is urgently required.

**B. The Courts Below Erred In The Application Of The "Slight Evidence" Rule To The Alleged Co-Conspirator Absent Parties.**

The trial court applied the so-called "slight evidence" rule to link many of the absent parties (previously settled defendants) to the conspiracies found by the jury, thereby increasing the joint and several liability of petitioner and the trial defendants.[9] The slight evidence upon which it relied, however, was that "*the challenged practices were industry-wide in scope* and were employed by all manufacturers." 1979-1 CCH Trade Cas. at 76,697, App. at C-3; emphasis added. In other words, the trial court held (and the Fifth Circuit affirmed *sub silentio*) that once a conspiracy is established, only conscious parallelism need be shown in order to connect additional co-conspirators. To our knowledge, no other reported antitrust decision applying the slight evidence rule has ever held that mere

[9] The first of these conspiracies (involving West Coast freight) allegedly included the three trial defendants and 16 other Southern softwood plywood manufacturers who were named as defendants but who settled prior to trial. The second (involving standard weights) allegedly included the three trial defendants and 19 other Western fir plywood manufacturers who were again named as defendants but who settled prior to trial, as well as the 16 Southern plywood producers mentioned above.

For a few of these absent parties there was evidence of direct communications in addition to conscious parallelism; but for the vast majority of them, the evidence relied upon in linking them to either of the alleged conspiracies was parallel conduct.

conscious parallelism will link an alleged co-conspirator to a conspiracy.[10]

Important policy reasons justify the Court's granting a writ of certiorari to review this issue. As the Third Circuit observed in an analogous context (denying standing to purchasers from defendants' competitors based upon an alleged overall industry price rise caused by defendants' conspiracy):

> "Allowing recovery for injuries whose causal link to defendants' activities is as tenuous as it is here could subject antitrust violators to potentially ruinous liabilities, well in excess of their illegally-earned profits, because ... price fixers would be held accountable for higher prices that arguably ensued in the entire industry. Notwithstanding the seriousness of the per se violation present in this case, the judiciary should not be hasty to allow the treble damage action to become so destructive a force, when Congress intended only that it be used as a weapon to enforce the antitrust laws." (*Mid-West Paper Prods. Co.* v. *Continental Group, Inc.*, 596 F.2d 573, 586-87 (3d Cir. 1979).)

We recognize that "solemnized covenants to conspire are difficult to come by in any price fixing case." 655 F.2d at 633, App. at A-6. Surely it is not a corollary, however, that evidence

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[10] *Cf. United States* v. *Consolidated Packaging Corp.*, 575 F.2d 117, 126 (7th Cir. 1978) (in a base price-fixing conspiracy case, proof of discussions regarding prices, and advance exchanges of bids constitute slight evidence); *United States* v. *Cadillac Overall Supply Co.*, 568 F.2d 1078, 1087 (5th Cir.), *cert. denied*, 437 U.S. 903 (1978) (proof of conversations regarding the switching of suppliers and agreements as to allocations of accounts constitute slight evidence); *Zenith Radio Corp.* v. *Matsushita Elec. Indus. Co.*, 513 F.Supp. 1100, 1169-70, 1265-98 (E.D.Pa. 1981) (proof of intercompany export agreements, membership in trade associations and parallel use of rebates do not constitute slight evidence); *Ohio ex rel. Brown* v. *Mahoning County Medical Soc'y*, 1980-1 CCH Trade Cas. ¶ 63,100 at 77,504 (N.D. Ohio 1979) (proof of efforts to get non-conspiring doctors fired and membership and participation in the illegal practices of committees constitute slight evidence); *Vandervelde* v. *Put & Call Brokers' & Dealers' Ass'n*, 344 F.Supp. 118, 155 (S.D.N.Y. 1972) (mere membership in a professional association does not constitute slight evidence).

such as that found sufficient in this case constitutes "proof of knowing, intentional participation in illegal activities." *Zenith Radio Corp.* v. *Matsushita Elec. Indus. Co.*, 513 F.Supp. 1100, 1149 (E.D.Pa. 1981). This Court should address the fundamental issues of antitrust conspiracy law presented here.

## II.

## THE FIFTH CIRCUIT ERRED IN UPHOLDING THE SINGLE-ELEMENT MEASURE OF DAMAGES.

### A. Damages In Single-Element Price-Fixing Cases Must Be Measured With Reference To The Price Of The Whole Product.

The second important issue raised by this petition is the appropriate measure of damages in single-element price-fixing cases.

In a price-fixing case, it is fundamental that "[t]he measure of damages to one of the conspirators' customers is the difference between the price actually paid and the one at which the product would have sold absent the conspiracy." *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 297 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980), *citing Reiter* v. *Sonotone Corp.*, 442 U.S. 330 (1979).

The product purchased by the plaintiffs in this case was plywood, not the freight charge for delivering plywood; the latter is merely one component of the total price. If the plaintiffs have in fact been injured, the measure of their damages is the difference between the total price (including freight) which they paid for plywood, and the total price (including freight) at which plywood would have sold absent the conspiracy. The measure of damages in this case is erroneous because it only focuses on the freight element of the price, improperly assuming that the overall purchase price of plywood was raised *ipso facto* by an amount equal to the amount by which the freight element allegedly was raised. The mill price is assumed to be a constant by this analysis, regardless of the existence or absence of a conspiracy. The Fifth Circuit's approval of this automatic, "one element" rule of

damages is not only economically irrational, but conflicts with the holdings of other circuits and the past guidelines of this Court.

Petitioner recognizes this Court's long-standing admonition that a distinction exists "between the measure of proof necessary to establish the fact [of] some damage, and the measure of proof necessary to enable the jury to fix the amount." *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931). Nevertheless, "even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork." *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946). Moreover, in the 36 years since *Bigelow*, when this Court last fully addressed the standards for measuring damages in antitrust cases, private antitrust litigation has significantly expanded, spurred especially by the advent of Rule 23 of the Federal Rules of Civil Procedure. *See Reiter* v. *Sonotone Corp.*, *supra*, 442 U.S. at 343 n.6.

In view of the procedural short cuts that allow for class-wide proof of impact and encourage class-wide damage formulas, it is particularly important that the measurement of damages in class actions reflect, as accurately as possible, the actual injury suffered by class members. The staggering amounts typically at stake in such cases call for, at a minimum, the most accurate measure reasonably possible—one which at least considers all elements of the price.

This Court must rearticulate the appropriate antitrust damage standards. The policies that liability should not go unpunished, and that it "does not 'come with very good grace' for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted" (*J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 566-67 (1981)), are rightfully strong. However, they do not justify the substitution of speculative, incomplete theories in place of proof which reasonably relates damages awarded to actual injury suffered.

*The Legal Standard.* The fallacy of uncritical reliance on automatic damage formulas was well illustrated in *City of Mishawaka, Ind.* v. *American Electric Power Co.*, 616 F.2d 976

(7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981). There, a private utility company and its affiliates were found by the district court to have violated the Sherman Act by charging excessive "wholesale" rates to municipal customers, in comparison with the rates charged to their retail customers. In the words of the Court of Appeals:

> "[T]he [district] court found that the municipalities had been overcharged by the amount the wholesale rates charged them exceeded the amounts which they would have been charged under the utility's retail rates actually in effect. The court proceeded to award damages based solely on a tripling of the difference between the higher wholesale rates paid by the municipalities and the lower retail rates which the utility actually charged its retail customers . . . No other factor entered into the computation." (616 F.2d at 987.)

Observing that "[t]he formula used by the trial court is recommended by its simplicity, but the computation of damages should not be expected to be quite that much easier than the rest of this case," the Seventh Circuit rejected the above measure of damages, and held that the district court had improperly assumed that the wholesale and retail rates charged by the utility would have been equivalent in the absence of the antitrust violation. *Id.* The district court's assumption was found to be "totally without foundation" since, apart from the different methods of calculating rates imposed by regulatory authorities, "in all likelihood, the utility has dissimilar fixed and variable cost requirements which it must seek to cover in its respective wholesale and retail rates." *Id.*

Likewise, the measure of damages approved by the courts below is premised on the unsupported assumption that the mill price of Southern plywood would have been identical absent the use of West Coast freight and standard weights. The trial court's "all or nothing" damage interrogatories did not permit the jury to question this assumption, which not only is unsupported by the record, but was rejected by the Ninth Circuit as defying "common sense." *Boise Cascade Corp.* v. *FTC*, 637 F.2d at 580, App. at J-14.

A similar point was made by the district court in *Albertson's, Inc.* v. *Amalgamated Sugar Co.*, 62 F.R.D. 43 (D.Utah 1973), *aff'd in relevant part, vacated in part*, 503 F.2d 459, 463 (10th Cir. 1974), where the plaintiffs alleged that a zone delivered pricing system unlawfully fixed the freight element of the purchase price of sugar. The district court observed that the very assumption made by plaintiffs and the lower courts in this case—that the base-price level was a constant—was untenable:

> "[Plaintiffs] assumed that their cost of sugar would be lowered by an amount equal to the phantom freight they now pay. If base point pricing were to be abandoned, it is clear that [defendants] would have to raise their base price.... The evidence indicates that some new basis price would have to be set...." (62 F.R.D. at 53.)[11]

This Court has also recognized that damage inquiry cannot end with a simple, mechanical determination that isolates only one aspect of a supposed restraint of trade; rather, all relevant factors bearing on the amount of plaintiffs' claimed damages must be considered. "The possible beneficial byproducts of a restriction from a plaintiff's point of view can of course be taken into consideration in computing damages...." *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 140 (1968). Reasonable estimates of damages by antitrust plaintiffs are acceptable so long as they are "not shown to be attributable to other causes." *Bigelow* v. *RKO Pictures, supra*, 327 U.S. at 264.

The Court in *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1980), clarified the issue of liability in cases involving products with multiple pricing components, holding that a

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[11] The assumptions by the courts in *Albertson's* and *Boise Cascade* that base prices would be raised if freight prices were lowered is supported by the record in this case, which indicates that prices did *not* drop when the West Coast freight system was abandoned. Vol. 56, Tr. 3168-70. Base prices necessarily must have been revised in order to compensate for the lowered freight rates. *Cf. In re Folding Carton Antitrust Litigation*, 83 F.R.D. 251, 254 (N.D.Ill. 1978) ("If an economically effective price conspiracy takes place over a long period of time and the industry suddenly becomes competitive, then profits and prices are expected to fall.").

conspiracy to fix one element alone is a *per se* violation of the Sherman Act. *Catalano* did not directly address the issue presented by this petition: whether damages in such cases can be measured solely by considering the single element. Nevertheless, this Court implicitly recognized that the damages to purchasers under the alleged agreement to eliminate credit terms would not automatically equal the amount of the credit eliminated: "[I]t may be that the elimination of a practice of giving variable discounts will ultimately lead in a competitive market to corresponding decreases in the invoice price [*i.e.*, purchase price]." *Id.* at 648-49. The fact that agreements such as those alleged in *Catalano* and this case may have diverse economic results should preclude the "all or nothing" rule adopted in this case.

In *J. Truett Payne Co.* v. *Chrysler Motors Corp., supra,* the Court rejected an "automatic damages" standard under the Robinson-Patman Act, holding that the amount of the price discrimination did not automatically equal the amount, if any, by which the plaintiff had been injured. Rather, the Court insisted that the "plaintiff must make some showing of actual injury" (451 U.S. at 562), a burden not satisfied merely by the testimony of plaintiff's expert that some harm must have resulted. The one-element damage formula at issue here is as arbitrary and unconnected to plaintiffs' actual injury as was the formula in *J. Truett Payne.*[12]

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[12] *See also Siegel* v. *Chicken Delight, Inc.*, 448 F.2d 43, 52-53 (9th Cir. 1971), *cert. denied,* 405 U.S. 955 (1972) (measure of damages for illegal tie-in could not be based upon the price rise of tied item alone, but must include consideration of tying item); *Berkey Photo, Inc.* v. *Eastman Kodak Co., supra,* 603 F.2d at 297-98 (measure of damages for monopolization limited to effect of defendant's wrongful acts rather than the difference between monopoly price and competitive price, since monopoly was lawfully acquired); *Herman Schwabe, Inc.* v. *United Shoe Mach. Corp.*, 297 F.2d 906, 912 (2d Cir.), *cert. denied,* 369 U.S. 865 (1962) (damage evidence "convey[ed] a delusive impression of exactness in an area where a jury's common sense is less available than usual to protect it"); *Union Carbide and Carbon Corp.* v. *Nisley,* 300 F.2d 561, 576-84 (10th Cir.), *cert. dismissed,* 371 U.S. 801 (1962) (relevant economic factors including existence of negotiated prices must be considered in

*footnote continued on following page*

*The Fifth Circuit's Failure To Analyze The Issue.* The above authorities uniformly recognize that a deceptively simple formula for computing damages must be closely scrutinized to ensure that it accurately reflects the true amount of injury sustained by the plaintiffs. By contrast, the opinion of the Fifth Circuit, upholding the measure of damages in this case, does not withstand analysis.

Dismissing the issue of whether the evidence supported the jury's verdict on measure of damages with the facile observation that "[t]he jury chose to accept the testimony of plaintiffs' economist and to reject the contrary testimony of defendants' economist" (655 F.2d at 635, App. at A-11), the Fifth Circuit skirted the issue raised by this petition—the propriety of a one-element measure of damages. Instead, the Fifth Circuit (in the context of rejecting the claim that submission of the issue to the jury was improper) devised an ill-conceived "estoppel" argument:

> "Defendants tried to convince the jury that their pricing system caused no economic injury to anyone. The jury, agreeing with plaintiffs and disagreeing with defendants, returned its special verdict upholding plaintiffs' theory. Having failed to persuade the first jury that their challenged practices caused damage to no one, defendants now seek the opportunity to convince a different jury that some other measure of damages is appropriate." (655 F.2d at 636, App. at A-11).

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*footnote continued from previous page*

determining damages); *Jacobi* v. *Bache & Co.*, 377 F.Supp. 86, 93 (S.D.N.Y. 1974), *aff'd*, 520 F.2d 1231 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976) (measure of damages for conspiracy to eliminate one element of commission payments must include consideration of other elements); *ILC Peripherals* v. *IBM Corp.*, 458 F.Supp. 423, 434-36 (N.D. Cal. 1978), *aff'd sub nom. Memorex Corp.* v. *IBM Corp.*, 636 F.2d 1188 (9th Cir. 1980), *cert. denied*, 101 S.Ct. 3126 (1981) (damage evidence rejected as speculation where there was a failure to separate effects of lawful from unlawful competition); *Wall Products Co.* v. *National Gypsum Co.*, 357 F.Supp. 832, 836-37 (N.D.Cal. 1973) (multitude of factors considered in determining amount of overcharge, including decline in price level after conspiracy, supply and demand, industry capacity, comparison of freight rates, etc.).

This argument hopelessly confuses *measure* of damages with a preliminary and distinct question: *fact* of damage (*i.e.*, "impact") to plaintiffs. The issue of whether members of the class have been injured at all by the challenged practices is quite separate from the issue of how those damages are to be measured, some injury being assumed. The Fifth Circuit ignored this distinction. Under its analysis, defendants cannot contest any *measure* of damages proposed by plaintiffs, however speculative or improper, if the defendants also opposed the finding of *fact* of damage. This reasoning confuses two distinct concepts, and creates a dangerous precedent barring antitrust defendants' rights to contest damage evidence.

Moreover, the Fifth Circuit incorrectly characterized the measure of damages issue as dependent upon the jury's belief as to the relative credibility of the parties' experts. Petitioner does not ask this Court to weigh credibility, or to sift conflicting evidence on what the "competitive" delivered price of plywood should have been; we recognize that such is not this Court's function. Plaintiffs' expert did not consider any factor other than freight, and the trial court's interrogatories allowed the jury to consider no other factor.[13] Thus, this case presents a clear legal issue which this Court must resolve: whether a measure of damages properly can be based on consideration of only one variable in the price of a product.

**B. The Trial Court's Failure To Instruct The Jury On Measure Of Damages Was Reversible Error.**

Even if this case presented no other issues of overriding importance, and no conflicts between the circuits, the trial court's failure to instruct the jury on the proper measure of damages would warrant the grant of certiorari and summary reversal.

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[13] These interrogatories were given to the jury despite petitioner's objection, *inter alia*, that the correct measure of damages was the difference between the actual price paid for plywood and the price if the challenged practice had not existed. Vol. 56, Tr. 3572-74.

The trial court's submission of the "all or nothing" damage interrogatories is even more remarkable in light of the fact that the court later stated it did not "necessarily agree" with the jury's finding that plaintiffs were damaged in the full amount of the freight differential. 1979-1 CCH Trade Cas. at 76,698; App. at C-4.

The Federal Rules recognize the particular importance of proper explanation by the trial court when special interrogatories are submitted: "The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue." Rule 49(a), F.R.Civ.P.[14] At a minimum, the trial court should have instructed the jury that the freight element and the standard weights could not be considered in isolation, but merely as part of the overall price, and that the measure of damages had to be based upon the amount by which that overall price was raised by the alleged conspiracy.[15]

The Fifth and the Ninth Circuits have reached conflicting results on the issue of whether the freight pricing system adopted by the industry had any effect on the total price ultimately paid by plywood purchasers. But the conflict between the decisions below and *Boise Cascade* goes far deeper than a mere disagreement over a particular factual issue. The

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[14] *See also Norfolk & W. Ry. Co.* v. *Liepelt*, 444 U.S. 490, 498 (1980) (reversible error for trial court to fail to instruct jury regarding factor to be discounted in computing damages); *Landy* v. *FAA*, 635 F.2d 143, 147 (2d Cir. 1980) ("Because the jury below was left completely at sea concerning the applicable legal standards, its findings did not constitute a proper and adequate factual basis for the fine imposed."); *Chagas* v. *Berry*, 369 F.2d 637, 641 (5th Cir. 1966), *cert. denied*, 389 U.S. 872 (1967) (failure by trial court in fraud case to instruct jury on proper measure of damages was reversible error).

[15] Failure to instruct the jury only compounded the trial court's error in even submitting the issue to the jury. The trial court, by a pretrial order entered in March 1978, "severed for subsequent trial as appropriate . . . amount of damages sustained by individual plaintiffs, intervenors and class members." ¶ 10(d), Supp.Vol. 35, 20416-17. Petitioners reasonably understood this to mean that measure of damages would not be tried in the liability phase of the litigation.

As the trial court subsequently acknowledged, petitioners reasonably equated "measure" with "amount" of damages, at least for purposes of the bifurcation order: "It may very well be and the Court has no reason to doubt [the] sincerity of defense counsel in equating those two terms." Vol. 59, Tr. 656.

trial court's submission failed to instruct the jury to consider the very principle which the Ninth Circuit found dispositive in this case: the probability that plywood sellers would raise their base price to correspond to a hypothetical decrease in freight.

We recognize that two fact-finders considering the same evidence may come to different results, because they have drawn different conclusions from the same facts. But that is not what happened here. The differing results flow not from different factual inferences drawn by different fact-finders, but because one of the two fact-finders—the jury in the proceedings below—was not given a correct legal standard against which to measure the evidence.

Several fundamental errors combined to result in this erroneous measure of damages: *first*, the trial court's failure to instruct the jury concerning the appropriate standards for measuring antitrust damages; *second*, its submission of special interrogatories which did not permit consideration of more than a single element of the price; and *third*, its *sua sponte* submission of the damage issue to the jury, contrary to the reasonable expectations of the defendants.

The issue presented here is simply whether a verdict may be rendered by a jury which has never been instructed to consider the applicable legal standard governing antitrust damages, and whose consideration of the question of damages was framed by interrogatories which improperly singled out one element affecting price (the difference between charged and actual freight) without requiring or even inviting consideration of other relevant factors. No verdict of any size—let alone one of this magnitude—should be based on such a procedure, and the Fifth Circuit's decision to the contrary should not be allowed to stand.

## CONCLUSION

For the foregoing reasons, petitioner respectfully prays that this Court issue a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit.

DATED: March 2, 1982

Respectfully submitted,

FREDERICK P. FURTH
*(Counsel of Record)*
THOMAS R. FAHRNER
DANIEL S. MASON
MICHAEL P. LEHMANN
CRAIG C. CORBITT
FURTH, FAHRNER, BLUEMLE & MASON
201 Sansome Street, Suite 1000
San Francisco, California 94104
Telephone: (415) 433-2070

*Attorneys for Petitioner Georgia-Pacific Corporation*

*Of Counsel:*
JAMES M. NICHOLSON
THOMAS E. WITHYCOMBE
WILLIAM E. CRAIG
GEORGIA-PACIFIC CORPORATION
900 S.W. Fifth Avenue
Portland, Oregon 97204
Telephone: (503) 222-5561

**ADDENDUM**

IN THE

# UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

| | |
|---|---|
| **IN RE PLYWOOD ANTITRUST LITIGATION** | MDL Docket No. 159 |

## EXCERPTS FROM THE TRIAL TRANSCRIPT NOVEMBER 14, 1978

### I.
### (Vol. 56, pp. 3536, line 1 through 3542, line 7)

THE COURT: (Continuing:) Now, there are some items of evidence that I want to comment upon because in your decision as to whether or not there was a conspiracy, contract here calling for these practices you will be looking at both direct evidence and circumstantial evidence. I have already explained earlier both what circumstantial is and how both circumstantial and direct evidence may be and are due to be considered by you in making your decision. I want to talk for a few minutes about some of the evidence in the case that may have some bearing on this decision of yours. I do so primarily for illustration and to give some greater understanding, perhaps, as to how that might relate to your decision.

There has been evidence of manufacturers talking with one another, obtaining pricing information from one another, buying from one another, including long term contracts. These practices, these transactions, these contacts in and of themselves are not illegal. Indeed, they may be vehicles for fostering competition. At the same time, such matters may also be conduct that, when viewed on their own and in the light of the

other evidence, indicate that there were agreements, expressed or implied, reached between manufacturers that they would use in selling plywood to others West Coast freight or standard weights. In short, although you should understand that when one manufacturer buys from another that is a contract, that contract in and of itself is not a violation of the Sherman Antitrust Law unless that contract involves and places a requirement that there will be in the resale of that product the use of West Coast freight or standard weights.

Now, the fact that manufacturers attended trade meetings, participated in trade discussions, likewise, in and of itself is not illegal under the Sherman Antitrust Act and, indeed, may be evidence or a means for fostering competition. On the other hand, such evidence is evidence that there was some opportunity for persons to have agreed or to have gotten together to assure that some previously agreed upon matter was being carried out. I, of course, would call to your attention that the mere fact that there be opportunity to meet or to agree does not mean that any particular agreement was or was not entered. It is merely one part of the total of the circumstantial evidence that you will be dealing with.

For example, it has been shown that the Plaintiffs or some of the Plaintiffs in this area were members of a trade association themselves, and that, as I say, going back to the question about the Defendants, is nothing illegal at all about that. There is nothing wrong in and of itself with either trade association or with going to trade meetings, but it is part of the facts, the circumstantial evidence which you are going to be called upon to make the decisions you are.

Now, there is evidence that plywood prices fluctuate, perhaps widely, and that there was competition among manufacturers in the selling of plywood. Now, those matters, if they be true, would not in and of themselves mean that there was no contract or conspiracy to use West Coast freight or standard weights. There is nothing that says that a conspiracy, for example, to restrain competition must restrain all competition. If there is a conspiracy to restrain certain aspects of competition, that is still against the law, against Section 1 of the

Sherman Antitrust Act. On the other hand, evidence of competition in other areas is a part of the circumstantial evidence that you will be considering in considering well, nevertheless they would have agreed to have established a particular form of price or to use particular restraints on competition. It will be a part of the total evidence in the case.

As I have indicated earlier, the fact that many or all manufacturers were to adopt the same or similar practices would not in and of itself mean that there was a conspiracy to do so. This would be true even if it were shown that they did so knowing that others were following similar practices. On the other hand, where it be a fact that similar practices are being followed by many manufacturers, with each being aware that the other is doing so, that is a part of the circumstantial evidence from which a jury may, with other evidence in the case, look to see whether this was so because of some agreement to do so.

In considering whether or not to draw any such inference, you would want to consider whether the different manufacturers adopting such practices were doing so because of their own independent best judgment as to what was in their best economic interest to do so, independent of any commitment or agreement from other people to do the same thing. In deciding this issue and in deciding what inference, if any, to draw, you would want to consider whether the practices that were being employed made sense in the light of the economic industry conditions and whether or not the benefits from those practices, continuation of those practices, were or were not dependent on other people, other manufacturers doing the same thing. You would want to consider whether those practices were, on the one hand, arbitrary and artificial and unduly complicated or, on the other hand, were helpful and useful and convenient.

Now, the mere fact, if it be a fact, that some practice was being followed that was artificial or arbitrary or unduly complicated, that fact in and of itself would not mean that it was a product of a conspiracy any more than would the fact, if it be a fact, that the practices were logical and convenient and helpful

indicate that there wasn't a conspiracy. These would simply be factors that you would take into consideration in the totality of the evidence in deciding whether or not to draw the inference that these matters came about not as a result of the decision by the individual companies that it was in their best interest to do so, but whether they did so because of some expressed or implied commitment and agreement from others to do likewise.

I do call your attention to the fact that you are not called into this case to pass judgment on whether the practices of the manufacturers were wise practices or were fair practices. That is not what you are called upon to decide. You might conclude that they were or they weren't. What you are called upon to do is to decide whether these practices were or were not the product of contract, combination or conspiracy as I have defined that.

## II.

**(Vol. 56, pp. 3552, line 1 through 3556, line 9)**

THE COURT: (Continuing:) Now, you will note that there are questions 2 and 4, and I haven't gone into those yet, nor have I really touched upon them in these instructions. I started off this second part of the instructions by saying that there are two elements in the claims that the Plaintiffs make against the Defendants and that they have a burden of proving each of the elements to your reasonable satisfaction. Because they must not only prove that West Coast freight, standard weights, were a result of a contract, combination or conspiracy but they must also prove to your reasonable satisfaction that these practices had a financial damage, caused financial damages to the people that bought plywood, the Plaintiffs and the other class members. Now, the Plaintiffs obviously are asking and insisting that you answer yes to questions 2(a) and 4(a). The Defendants are saying that you should answer no to those questions, that the Plaintiffs have not proved that, and that your decision then ought to be no.

The questions I think are easy to understand and really don't require that much explanation. 2(a), did the use of West Coast freight in the pricing of southern pine plywood during the period from February 23, 1968 to December 31, 1973 cause financial damage to the purchasers of such plywood, answering either yes or no.

You have a similar question on 4(a). It asks the same question but with respect to the use of standard weights, as to whether the use of standard weights during that period of time caused financial damage to the people buying western fir plywood.

Now, and again, the Plaintiff [sic] in asking that you answer that yes has a burden to persuade you to answer yes to that. The Defendants are asking you to answer no to that. If you conclude that, yes, the use of southern—of West Coast freight or of standard weights or both did cause damage to the people who bought southern pine plywood and western fir plywood respectively, you are then asked to go on to these questions 2(b) and 4(b), and that is to say whether the damage that was caused to the purchasers is, as the Plaintiffs contend in the case of West Coast freight, the difference between the West Coast freight and the actual freight. Plaintiffs are saying that in the pricing of southern pine plywood that there was damage caused to people who bought that southern pine plywood to the extent of the difference between the West Coast freight and the actual freight.

Now, actually you will remember that there is some evidence in the case that not in all cases was the manufacturer involved in the shipping of the plywood to a particular purchaser's destination but that on some of those that there was an actual pickup in some way by the purchaser at the mill sight [sic], for example, or the purchaser arranged for his own transportation, and that in those situations there was some allowance given off of the price for picking it up rather than the manufacturer paying the freight charges. Now, in those

situations the Plaintiffs would say that the actual damage caused was the difference between the West Coast freight and this allowance that was given as a deduction against the price.

So in question 2(b), if you have answered 2(a) yes, you are to go on forward and say whether the Plaintiffs are correct in their contention that the amount of damage that was sustained by purchasers was equal to the difference between the West Coast freight and the actual freight or the allowance given for picking up or handling their own freight. The Plaintiffs are asking that you answer yes to that question. The Defendants are saying that—of course they are saying you shouldn't have to get to that question at all, but they are also saying answer no if you do get to that question.

4(b) is of a similar form; that is, it is saying that if you have decided that there was damage caused by the use of standard weights, damage to the purchasers of western pine plywood, then was that damage equal to the amount by which freight calculated on the basis of the standard weight or estimated weight or association weight, whatever you want to call it, exceeded the freight that was actually paid. The Plaintiffs say that is the amount by which the purchasers of western pine plywood were damaged, the difference between a freight calculation based on these estimated or standard or association weights and, on the other hand, the actual freight incurred. Here again, the Plaintiffs ask that you answer yes to that, and the Defendants say, Number One, that you shouldn't have to get to that point but if you do you should answer no.